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Before the
Federal Communications Commission
Washington, D.C. 20554

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JUN 23 1997

In the Matter of)	Federal Communications Commission
)	Office of Secretary
Implementation of the Pay Telephone)	CC Docket No. 96-128
Reclassification and Compensation)	
Provisions of the Telecommunications)	
Act of 1996)	

**COMMENTS OF MIDCOM COMMUNICATIONS INC. ON
PETITION OF TELCO COMMUNICATIONS GROUP, INC.**

I. INTRODUCTION

MIDCOM Communications Inc. ("MIDCOM") hereby submits its Comments on the Petition of Telco Communications Group, Inc. for Waiver of Section 64.1301 of the Commission's Rules ("Petition"). As more fully described in the Petition, Telco requests that the Commission grant it a waiver of Section 64.1301 of the Commission's Rules, which requires certain interexchange carriers ("IXCs") to provide compensation to payphone service providers ("PSPs") on a flat-rate, per-phone basis from November, 6, 1996, through November 5, 1997, and instead allow Telco to satisfy its obligations on a per-call basis. For the reasons stated below, MIDCOM supports Telco in its Petition and urges the Commission to grant Telco the waiver. In addition, MIDCOM requests that the Commission clearly state that a waiver of Section 64.1301 should be granted to any IXC that makes a showing similar to that of Telco.

II. BACKGROUND

Section 276 of the Telecommunications Act of 1996 (the "Act") requires, among other things, that all PSPs be fairly compensated for each and every completed intrastate and interstate call

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originated from their payphones.¹ The Commission adopted rules in a *Report and Order* and *Order on Reconsideration* in CC Docket No. 96-128 to implement this requirement.² Specifically, the Commission adopted a “carrier-pays” system of compensating PSPs, under which all IXC’s that carry calls from payphones are required to pay per-call compensation to PSPs.³ However, in order to give the industry the opportunity to prepare for this new system, the Commission established an interim compensation period (from November 6, 1996, through November 5, 1997), during which all IXC’s that generated at least \$100 million in annual toll revenues in 1995 would be required to pay a proportionate share of a flat-rate of \$45.85 per payphone per month.⁴ This compensation method is identical to the one adopted by the Commission in the *Second Report and Order* in CC Docket No. 91-35,⁵ except that the statutory exclusion for those carriers that are not providers of operator services is no longer a basis for being excused from the compensation obligation⁶ and the compensation rate has been increased from \$6.00 per payphone per month to \$45.85.⁷

In its Petition, Telco seeks to pay its portion of payphone compensation during the interim compensation period on a per-call basis rather than a flat-rate basis because it has the technical

¹ 47 U.S.C. §276(b)(1)(A).

² Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128, Report and Order, FCC 96-388 (rel. Sept. 20, 1996) (“*Payphone Order*”); Order on Reconsideration, FCC 96-439 (rel. Nov. 8, 1996) (“*Order on Reconsideration*”); appeal docketed *sub nom.* Illinois Public Telecommunications Assn. v. FCC and United States, Case No. 96-1394 (D.C. Cir., filed Oct. 17, 1996) (collectively, “*Payphone Reclassification Orders*”).

³ *Payphone Order* at para. 83.

⁴ *Id.* at para. 119. Section 64.1301 of the Commission’s Rules, 47 C.F.R. § 64.1301, was amended accordingly.

⁵ Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation, Second Report and Order, 7 FCC Rcd 3251 (1992) (“*Second Report and Order*”).

⁶ *Payphone Order* at para. 119.

⁷ *Id.* at para. 125.

capability to track calls originating from payphones during this period.⁸ Telco argues that requiring it to compensate PSPs on a flat-rate basis would be patently unfair because an extraordinarily small percentage of its calls are received from payphones, such that Telco would be required to greatly overcompensate PSPs.⁹ Because Telco is able to track calls originating from payphones through its digital switching facilities, Telco asserts that it should currently be allowed to pay compensation on a per-call basis, thereby furthering the goals and policies of both the Act and the *Payphone Reclassification Orders*.¹⁰

III. COMMENTS

A. Telco's Petition is Consistent with Similar Waivers Granted by the Commission.

Under the flat-rate compensation method adopted in the *Second Order and Report*, the Commission has previously granted waivers to at least three IXCs, thereby allowing them to satisfy their compensation obligations on a per-call basis. Most recently, the Commission granted a waiver to Oncor Communications, Inc. for the period April 1, 1996, through November 5, 1996.¹¹ The Commission noted in the *Oncor Waiver* that it had previously expressed its preference for a per-call compensation mechanism in the *Second Order and Report*.¹² The Commission concluded that a waiver was appropriate because Oncor had shown that it was able to pay compensation on a per-call basis and a waiver did not undermine the Commission's overall compensation rule in CC Docket No. 91-35, but actually served the public interest by encouraging PSPs to place their payphones in

⁸ Telco Petition at 1-2.

⁹ *Id.* at 4-5.

¹⁰ *Id.* at 6-8.

¹¹ In the Matter of Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation, CC Docket No. 91-35, Memorandum Opinion and Order, DA 97-482 (rel. March 7, 1997) ("*Oncor Waiver*").

¹² *Id.* at para. 2 (citing *Second Report and Order*, 7 FCC Rcd at 3252-53).

locations that are likely to generate the most calls.¹³ Prior to the *Oncor Waiver*, the Commission granted similar waivers to AT&T and Sprint, holding that, because each of these IXC's was able to compensate PSPs on a per-call basis, they should be allowed to satisfy their obligations through this mechanism.¹⁴

Under the *Second Order and Report* and several subsequent decisions, the Commission has established a clear preference for a per-call compensation mechanism and has furthered this preference by granting waivers allowing certain IXC's to satisfy their obligations through this mechanism. Because the compensation mechanism during the interim period under the *Payphone Reclassification Orders* is essentially identical to the mechanism that existed under the *Second Order and Report*, IXC's should be allowed to avail themselves of the same waivers previously granted by the Commission, as long as they can show that they have the ability to track calls originating from payphones.

B. Waiver of the Flat-Rate Compensation Requirement is Appropriate.

The Commission noted in the *Oncor Waiver* that a "[w]aiver of Commission rules is appropriate only if special circumstances warrant a deviation from the general rule and such deviation serves the public interest."¹⁵ Both of these elements have been met in this case. First, Telco has shown that special circumstances exist because it is able to track calls from payphones and it has the ability to pay compensation on a per-call basis. The reason that the Commission adopted the interim

¹³ *Id.* at para. 12.

¹⁴ See Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation, Memorandum Option and Order, 10 FCC Rcd 1590 (Com. Car. Bur. 1994) ("*AT&T Waiver*"); Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation, Memorandum Option and Order, 10 FCC Rcd 5490 (Com. Car. Bur. 1995) ("*Sprint Waiver*").

¹⁵ *Oncor Waiver* at para. 12 (footnotes omitted) (citing *Northeast Cellular Telephone Company v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) and *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969)).

compensation method was because it determined that there was a need for a one-year transition period to give IXC's time to create the technology to track compensable calls.¹⁶ Because Telco can already track these calls, it should be allowed to immediately transition to a per-call compensation mechanism.

Second, allowing Telco to meet its compensation obligations on a per-call basis serves the public interest. In addition to the public interest concerns outlined in the *Oncor Waiver*,¹⁷ granting a waiver to Telco would prevent PSPs from being overcompensated for calls that are simply not made. Telco has shown that its customers make very few calls from payphones, such that Telco's compensation level under the flat-rate mechanism far exceeds what its obligations would be under a per-call mechanism. If Telco is required to provide compensation on a flat-rate basis, it would be forced to either absorb the excess costs or, more likely, to pass them through to its customers. Most of Telco's customers would therefore pay for a service they did not use. However, if Telco is allowed to pay PSPs on a per-call basis, it can simply pass the per-call charge on to the customer that benefited from the payphone call. Such a mechanism not only ensures that PSPs are fairly compensated as required by the Act, but also prevents Telco and its customers from being unfairly burdened.

C. Waiver Should Be Applied to Any Similarly Situated IXC.

MIDCOM will be filing a similar petition seeking a waiver of Section 64.1301 in the near future. Rather than determining this issue on a case-by-case waiver basis, MIDCOM urges the Commission in its decision on the Telco Petition to allow any IXC subject to the interim compensation requirement to be granted a waiver of Section 64.1301 upon a showing that the IXC

¹⁶ *Payphone Order* at para. 99.

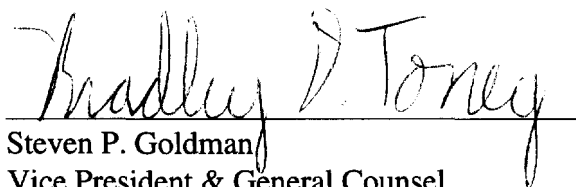
¹⁷ *See Oncor Waiver* at para. 12.

has the ability to pay compensation on a per-call basis during the interim period. Such a holding would not be contrary to the Act or the *Payphone Reclassification Orders*, but instead would further the policy that PSPs receive *fair* compensation (and not be overcompensated) and would correspond with the Commission's clear preference for a per-call compensation mechanism.

IV. CONCLUSION

Telco has established the prerequisites for obtaining a waiver of Section 64.1301 of the Commission's Rules by showing that (1) it is able to track calls from payphones and to pay compensation on a per-call basis during the interim period and (2) a per-call compensation mechanism during the interim period is clearly in the public interest. The Commission should therefore grant Telco's waiver as requested in its Petition. The Commission should also expand its decision beyond Telco's specific request to allow any IXC that makes a similar showing to obtain a waiver of Section 64.1301.

Respectfully Submitted,

A handwritten signature in cursive script that reads "Bradley D. Toney". The signature is written in dark ink and is positioned above a horizontal line.

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June 2, 1997

CERTIFICATE OF SERVICE

I, Cynthia S. Shaw, do hereby certify that on this 3rd day of June, 1997, I caused copies of the foregoing "Comments of MIDCOM Communications, Inc. on Petition of Telco Communications Group, Inc." to be served via first-class mail, postage prepaid (except where indicated as via hand-delivery), to the following:

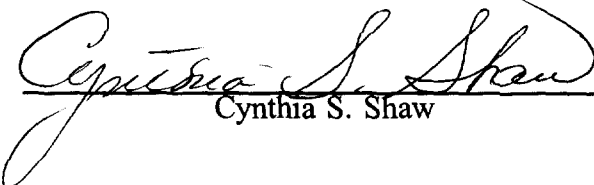
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